(14)

CASE # 04-967

In The Supreme Court Of The United States

NORMA MCCORVEY,
FORMERLY KNOWN AS JANE DOE

PETITIONER

Vs.

WILLIAM "BILL" HILL,
DALLAS COUNTY DISTRICT ATTORNEY

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE
THE BLACKSTONE INSTITUTE AND
VIRGINIA C. ARMSTRONG, PH.D., PRESIDENT,
IN SUPPORT OF PETITIONER

WILLIAM F. CUETO
COUNSEL OF RECORD
289 LAUREL WAY
MIAMI SPRINGS, FL 33166
PHONE: (786) 514-6200

COUNSEL FOR THE BLACKSTONE INSTITUTE AND VIRGINIA C. ARMSTRONG, PH.D.

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BRIEF OF AMICI CURIAE

STATEMENT OF INTEREST

The Blackstone Institute is a 501(c)(3) enterprise which has been pursuing research and education since 1984. The mission of the Institute is to declare and defend the Judeo-Christian worldview of the Constitution, law, philosophy, and other related fields. The Institute is named for the eighteenth century British jurist, Sir William Blackstone, whose legal philosophy dominated English and American law until well into the twentieth century.

The Institute focuses on those fundamental national issues which stand at the intersection of constitutional law, theory, history, jurisprudence, public policy, and culture. One such issue is the sanctity of life. Blackstone is committed to the highest standards of scholarship and to working with Americans who both agree and disagree with its purposes and positions.

The Blackstone Institute's president is Virginia C. Armstrong, Ph.D. Dr. Armstrong is a career university professor who recently took early retirement from Hardin-Simmons University in Abilene, Texas. Dr. Armstrong was Director and Senior Professor of Legal Studies and Political Science. She founded the University's Legal Studies Program as well as the Texas Undergraduate Moot Court Association and served as the first Chairman of both. She also drafted problems argued in moot court competitions across Texas.

Dr. Armstrong wrote both her masters degree thesis and doctoral dissertation on the U. S. Supreme Court. She has written, spoken, and been interviewed widely on legal and constitutional topics and Christian apologetics. Dr. Armstrong now pursues her passion for research and education in a wide variety of venues across the nation. She also serves as National Chairman of Eagle Forum's Court Watch.

The Blackstone Institute and Dr. Armstrong have a vital interest in this litigation and bring to this debate an extraordinary knowledge of, and perspective on, the issues involved. Blackstone represents a significant group of Americans across the country whose voice deserves to be heard as expressed in this *amicus curiae* brief.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

Roe v. Wade[1] should be overturned. It has spawned decisions which have created substantially different legal conditions from those prevailing before 1973 – decisions which violate several fundamental standards of American law. The two most recent decisions, and the decisions which raise the most basic questions of law, are *Planned Parenthood of Southeastern Pennsylvania v.* Casey[2] and *Stenberg v. Carhart.*[3]

These two decisions create manifest injustice as the term is used in Federal Rule of Civil Procedure 60. The decisions also violate the rule of law as referred to in *Casey*. *Casey* and *Stenberg* create uncertainty, inconsistency, and discontinuity in American law and are not rooted in the U. S. Constitution. Under these circumstances, the principle of *stare decisis,* which requires that judicial decisions line up with the ultimate American legal precedent, the Constitution, directs this Court to vacate, not reaffirm, *Roe.*

After thirty-two years of generating injustice and violations of the rule of law culminating in *Casey* and *Stenberg, Roe* should be put to rest. This Court should grant petitioner's request for a writ of certiorari and vacate the judgment in *Roe v. Wade.*

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[1] 410 U.S. 113 (1973).

[2] 505 U.S. 833 (1992).

[3] 530 U.S. 914 (2000).

REASONS FOR GRANTING CERTIORARI

I.

AMERICAN LAW PROVIDES FOR THE OVERTURNING OF PRECEDENTS UNDER CERTAIN CIRCUMSTANCES.

A. FEDERAL RULE OF CIVIL PROCEDURE 60(B) AND *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA* ARTICULATE STANDARDS FOR OVERTURNING PRECEDENT.

The Court may vacate a judgment that is no longer equitable. Rule 60(b) states that "On motion, and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application; . . . ."

A Rule 60 motion should be granted if the party seeking relief can show "a significant change either in factual conditions or in law."[4] This change can be in either "statutory or decisional law."[5] In the Court's most recent application of Rule 60(b) , it held that "the ['law of the case'] doctrine[6] does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a *manifest injustice.*'"[7]

"Manifest injustice" as used in Rule 60 occurs under at least two circumstances. First, injustice is "manifest" if it creates harm equal to, or greater than, the harm found by the Court to exist in *Agostini*.[8] Second, injustice is "manifest" if the court decision vio-

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[4] *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992).

[5] *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

[6] *Id.* at 236 ("Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation.").

[7] *Id.* (emphasis added) (second alteration in original) (citation omitted).

[8] *Agostini v. Felton*, 521 U.S. 203 (1997) (citation omitted).

lates more than one of the three standards of certainty, consistency, and continuity as discussed throughout this brief.

The U. S. Supreme Court held in *Casey*[9] that "it is common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case."[10] The Court's decision as to whether to overturn a precedent includes "test[ing] the consistency of overruling the holding with the ideal of *the rule of law*."[11] *Stare decisis*, defined as nothing more than adherence to a previous decision, does not trump the rule of law. Indeed, both the rule of law and the principle of *stare decisis* are best served when a previous decision that violates the Constitution is overturned.

B. BOTH THE RULE OF LAW AND JUSTICE IN AMERICA ARE CHARACTERIZED BY SEVERAL QUALITIES.

"The rule of law" is a concept which extends to the heart of America's legal system but has roots extending outside of law into the realm of philosophy. An apt definition of "the rule of law" is "the largely formal or procedural properties of a well-ordered legal system. Commonly, these properties are thought to include: a prohibition of arbitrary power (the lawgiver is also subject to the laws); laws that are general, prospective, clear, and consistent (capable of guiding conduct); and tribunals (courts) that are reasonably accessible and fairly structured to hear and determine legal claims."[12]

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[9] *Planned Parenthood of Southwestern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[10] *Id.* at 854 (citation omitted).

[11] *Id.* at 834 (emphasis added).

[12] CAMBRIDGE DICTIONARY OF PHILOSOPHY 801 (2d ed. 1999).

"The rule of law" also encompasses the concept of doing justice. For a court to do injustice is *ipso facto* to violate the rule of law. A variety of authoritative dictionaries make this point.

"Justice is conformity of our actions and our will to the law."[13] "Justice" is "practical conformity to the laws and to principles of rectitude in the dealings of men with each other."[14] "At least since Aristotle, justice has commonly been identified both with obeying law and with treating everyone with fairness."[15]

The common thread running through these definitions of "justice" in varied dictionaries is that of conformity to law. Justice is a vital ingredient of the rule of law.

C. BOTH THE RULE OF LAW AND JUSTICE IN AMERICA REQUIRE THAT COURT DECISIONS MANIFEST CERTAINTY, CONSISTENCY, AND CONTINUITY.

Senator Sam Ervin, Jr., expressed the point well in saying that "a government of laws . . . [is] a government which rules by *certain, constant, and uniform* laws rather than by the arbitrary, uncertain, and inconstant wills of impatient men who happen to occupy for a fleeting moment of time legislative, executive, or judicial offices."[16] Ervin's use of the words, "certain, constant, and uniform" is synonymous with the qualities required of a mature legal system as described by Oxford Professor of Jurisprudence H.L.A. Hart.[17] For

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[13] BLACK'S LAW DICTIONARY 1002 (4th ed. 1968).

[14] WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (1828 ed.).

[15] CAMBRIDGE DICTIONARY OF PHILOSOPHY 456 (2d ed. 1999)

[16] Senator Sam J. Ervin, Jr., *Judicial Verbicide: An Affront to the Constitution*, *in* BLUEPRINT FOR JUDICIAL REFORM 3, 5 (Patrick B. McGuigan and Randall R. Rader eds. 1981). (emphasis added).

[17] H.L.A. Hart, Concept of Law (1961). Hart is a preeminent leader of later twentieth century Anglo-American jurisprudence, particularly the movement known as "Neo-Analytic" or "Linguistic" Jurisprudence. "The work of H.L.A.

America to retain the mature legal system established by the Constitution, it must adhere to the standards articulated by Hart and embodied in the Constitution.

Hart asserts that every legal system begins with a set of "primary rules of obligation." These rules are successful only in a primitive society that is very closely knit, small, and stable. In these primitive societies, a group's attitudes toward "its own standard modes of behavior" provide the means for social control. However, as time passes, the legal system, by use of the primary rules of obligation alone, develops deficiencies.[18] The first deficiency is uncertainty. That is, primary rules do not identify what a "law" is. When does a "rule" become a "law" if there are no identifying marks for society to follow?

Second, primitive rules eventually lead to stagnation in law and society. Changes in the law are very slow and gradual and tend to lag behind circumstances and community needs. The *rate of change in the law* relative to changes in society is the basic problem about which Hart writes: "deliberately adapting the rules to changing circumstances" is his concern. It is therefore possible that changes in the law can be much more *rapid* than changes in society, rather than legal changes lagging behind societal changes. In this state, the system suffers from *convolution*, not *stagnation*.

Third, asserts Hart, primitive rules are inefficient – they do not provide an adequate way for settlement of disputes regarding which rules apply and when a rule

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Hart stands out as a leading effort [to apply the philosophy of linguistic analysis to law]." LEE CAMERON MCDONALD, WESTERN POLITICAL THEORY, 599 (1968). Professor Hart has been cited three times by the U.S. Supreme Court: in *Bowers v. Hardwick*, 478 U.S. 186, 212 (1986), (Blackmun, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 355 (1976) (White, J. dissenting); and *Furman v. Georgia*, 408 U.S. 238, 395 (1972) (Burger, C.J., dissenting).

[18] *Id.* at 89–91.

violation has occurred. In this kind of system, disputes continue interminably.

Because a system of primary rules is plagued by uncertainty, stagnation (or convolution), and inefficiency, secondary rules emerge.[19] Secondary rules consist of rules of recognition, change, and adjudication. As secondary rules and the primary rules merge into an integrated system, a mature legal system develops.[20] To counter uncertainty, "rules of recognition" emerge.[21] These identify when a rule becomes a law and the essential qualities of that "law."[22] To counter stagnation (or convolution), "rules of change" emerge to identify when laws are being legitimately changed, and specifying the persons and procedures involved.[23] Finally, to counter inefficiency, "rules of adjudication" emerge.[24] These rules specify when a primary rule has been broken, who is going to adjudicate the resulting dispute, and how.[25]

In summary, secondary rules have the following purposes. Rules of recognition produce *certainty* (as much as is possible in human society); that is, legal actions and standards (such as court decisions) can be objectively and clearly understood, and society can have the confidence that these objective and clear standards will guide future legal acts. Rules of change produce *continuity* between the present and the past; that is, current and past decisions are consistent with one another unless there is an authoritative, compelling reason for change in later decisions (as discussed

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[19] *Id.* at 90–91.

[20] *Id.* at 91.

[21] *Id.* at 92.

[22] *Id.* at 92–93.

[23] *Id.* at 93.

[24] *Id.* at 94.

[25] *Id.*

below). Rules of adjudication produce *consistency* among the various adjudicative actions; that is, a judicial decision should contain no internal inconsistencies, nor should judicial decisions existing at a particular point in time be inconsistent with one another.[26] These three standards are closely related to one another, and violation of one may inevitably produce violation of one or both or the other two.

The degree to which a court decision or line of decisions, fails to manifest certainty, consistency, and continuity is the degree to which the legal system digresses toward a primitive state.[27] Once a legal environment of uncertainty, inconsistency, and discontinuity exist, injustice and violations of the rule of law are inevitable.

D. THE TOUCHSTONE OF CERTAINTY, CONSISTENCY, AND CONTINUITY IS THE U. S. CONSTITUTION.

In the United States, Hart's rules of recognition, change, and adjudication are consistent with the U.S. Constitution. The Constitution creates a "rule of recognition" when it "recognizes" as the supreme law "This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States . . . ."[28] The Constitution sets forth a rule of change when it specifies the process for amending the document in Article V, and a rule of adjudication is illustrated when the Constitution declares that the national judicial power extends to "cases and controversies" which are spelled out in Article III.

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[26] *Id.* at 91–95.

[27] VIRGINIA ARMSTRONG ET AL., COURTING JUSTICE: A GUIDE TO JUDICIAL REFORM 36-37 (2000).

[28] U.S. CONST. art VI., cl. 2.

Therefore, certainty, consistency, and continuity – core characteristics of the rule of law and justice – require the courts in matters of constitutional interpretation to adhere to the Constitution as understood by reference to its text, the intent of its writers, and the American and English Common Law tradition in which the Constitution is moored. Constitutional interpretation is often difficult enough when there is a committed effort to rely on specific words, intent as revealed by manifold historical sources, and traditions likewise readily apprehendable. To ignore these resources is to plunge constitutional interpretation into an abyss of chaos, convolution, and contradiction.

Chief Justice John Marshall made this point when he wrote:

> To say that the intention of the instrument [*i.e.*, the U.S. Constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; – is to repeat what has been already said more at large, and is all that can be necessary.[29]

The Constitution can provide the nation with certainty, consistency, and continuity only if courts understand the nature of the Constitution and the judiciary's power regarding it, and make decisions accordingly. The nature of the Constitution and judicial power were spelled out in the very court decision which created judicial review – *Marbury v. Madison*.[30] First, Chief Justice Marshall describes the Constitu-

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[29] *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

[30] 5 U.S. 137 (1803).

tion as "*fundamental*," "*supreme*," and "*permanent*."[31] Marshall then emphasizes that the judiciary is subordinate to, and governed by, the Constitution. "[T]he framers of the Constitution contemplated that instrument as a rule for the government of course, as well as of the legislature."[32] He adds, "How immoral to impose it [*i.e.*, an oath supporting the Constitution given to judges], if they were to be used as the instruments; and the knowing instruments for violating what they swear to support!"[33] He continues, "Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for *his* government?[34] Marshall summarizes with his famous aphorism, "The government of the United States has been emphatically termed a government of laws and not of men."[35]

Professor G. Edward White explains:

> Marshall's principal justification for independent judicial review was that judges did not make law, but merely "found" and "declared" it. Marshall's argument assumed that "law" was a universal body of principles, that those principles were "discoverable" by technically skilled persons, such as judges, that in "discovering," judges were merely stating "what the law was." The only power judges had, under Marshall's view was their *professional* power: their technical expertise enabled them to be better "finders" of law than other persons.[36]

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[31] *Id.* at 175-78.

[32] *Id.* at 179-80.

[33] *Id.* at 180.

[34] *Id.* (emphasis added).

[35] *Id.* at 163.

[36] G. Edward White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and Lessons of History*, 63 JUDICATURE 163 (1979).

The power of judicial review is rooted in these presuppositions, and any exercise of judicial review by any court is valid only to the extent to which judges are faithful to the Constitution and the judicial role as described herein.

The necessary relationship between the rule of law, justice, the Constitution, and the qualities of legal certainty, consistency, and continuity have been noted throughout American history. Professor Raoul Berger asserts that "The written Constitution was thus the highest expression of the 'rule of law,' designed to limit the exercise of power and to make the agents of the people accountable."[37] Justice Felix Frankfurter agrees: "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[38]

II.

THE *CASEY* AND *STENBERG* DECISIONS, AS THE PROGENY OF *ROE*, PROVE THAT *ROE* SHOULD BE OVERTURNED UNDER THE STANDARDS DESCRIBED ABOVE.

A. *CASEY* AND *STENBERG* ARE INSEPARABLY RELATED TO *ROE* BUT ALSO REPRESENT A "SIGNIFICANT CHANGE IN THE LAW" WHICH ENGAGES RULE 60 IN THIS CONTROVERSY.

"Liberty finds no refuge in a jurisprudence of doubt."[39] Both as to their findings and their foundations, the Court's abortion decisions from 1973 through 2000 do indeed create a "jurisprudence of doubt," as discussed below. This "doubt" results from uncertainty, inconsistency, and discontinuity, and

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[37] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 291 (1977).

[38] *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

[39] *Casey*, 505 U.S. at 844.

within particular decisions, among the decisions, and in the foundations of both law and fact upon which the decisions rest. Thus, the Court's abortion jurisprudence violates the rule of law and is productive of manifest injustice. These decisions have produced *significant changes in abortion law* as contemplated by Rule 60 since 1973 while retaining an inseparable relationship with *Roe*.[40]

Casey and *Stenberg* feed a jurisprudence of doubt with special vengeance. At the core of *Roe* was its ruling and supporting rationale creating a woman's constitutional right to an abortion.[41] *Casey* passionately reaffirmed *Roe*'s right to an abortion. *Stenberg* produced an extreme expansion of the right to an abortion. *Casey* and *Stenberg* rest on *Roe*. Without *Roe*, there would be no *Casey* or *Stenberg*; the latter two are the progeny of the first. If, therefore, the core of *Casey* and *Stenberg*, (*i.e.*, their rulings and rationale) are violative of the Rule of Law and productive of manifest injustice, *Roe* should be vacated. Because these lawless and unjust decisions are the type of jurisprudence that *Roe* is still producing after thirty-two years and dozens of intervening abortion decisions, the continued application of *Roe* would produce further manifest injustice and violations of the rule of law. The uncertainty, inconsistency, and discontinuity of *Casey* and *Stenberg* are considered below.

B. THESE CASES RELY ON DECISIONAL STANDARDS THAT ARE UNCERTAIN, INCONSISTENT, AND DISCONTINUOUS AND ARE *IPSO FACTO* INADEQUATE GROUNDS FOR UPHOLDING *ROE*.

1. The joint opinion in *Casey* professes to employ the process of "reasoned judg-

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[40] *See infra* part III.

[41] *Casey*, 505 U.S. at 848.

ment" – a concept without roots in the Constitution's text, history, earlier interpretations, or English Common Law.

The three justices of the *Casey* joint opinion assure us that "[this process] certainly has not been one where judges have felt free to roam where unguided speculation might take them."[42] At the same time, they admit that "No formula could serve as a substitute, in this area, for judgment and restraint."[43] But how does one define and apply "judgment" and "restraint" and correct misjudgment and lack of restraint? The process of "reasoned judgment" is not even employed in *Casey*'s progenitor (*i.e.*, *Roe*) nor in *Casey*'s successor (*i.e.*, *Stenberg*). Indeed, "reasoned judgment" could just as well produce anti-abortion decisions as well as *Casey* and *Stenberg*.[44] There is no certainty, consistency, or continuity to the exercise of "reasoned judgment." Other assertions in the joint opinion illustrate this fact.

One example of such assertion is the famous, but totally mystifying "mystery passage:" "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[45] The key terms in this definition of liberty have no objective foundation and are a recipe for anarchy.

Another example is the assertion that "Our obligation is to define the liberty of all, not to mandate our own moral cod[illegible]."[46] But a statement that something should be done (*i.e.*, "we have an *obligation*") is itself a statement of a moral standard, a value.

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[42] *Id.* at 850.

[43] *Id.* (quoting *Poe v. Ullman*, 367 U.S. 542 (1961).

[44] *Id.* at 982.

[45] *Id.* at 851.

[46] *Id.* at 850.

2. The "undue burden" standard is also without roots in the Constitution's text, history, earlier interpretation, or Common Law.

The "undue burden" standard pronounced in *Casey*[47] also suffers from deficiencies in the lack of an objective definition, clarity as to its application, and standards by which to weigh this value against other values. The joint opinion defines "undue burden" as "a substantial obstacle" to a woman's seeking an abortion.[48] But "substantial obstacle" is as unclear, uncertain, and inconsistent as "undue burden."

Such a standard leads inevitably to the dissension among the Justices about the application of "undue burden" in *Stenberg*.[49] It should have been predictable that *Casey* would lead to a 5-4 decision and eight opinions in *Stenberg*. As Justice Scalia points out in his dissent in *Stenberg*, "[the decision] has been arrived at by precisely the process *Casey* promised – a democratic vote by nine lawyers."[50] Furthermore, he rightly maintains that "it is a value judgment" and a vote "upon the pure policy question whether this limitation upon abortion is 'undue' – *i.e.*, goes too far."[51] Is this the "reasoned judgment" promised by the three-justice plurality in *Casey*?

The problematic nature of *Casey* as a precedent is further explained by Justice Scalia in his *Stenberg* dissent: "It would be unfortunate, however, if those who disagree with the result were induced to regard it as merely a regrettable misapplication of *Casey*. It is not that, but is *Casey's logical and entirely predictable*

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[47] *Casey*, 505 U.S. at 874.

[48] *Id.* at 877.

[49] *Stenberg*, 530 U.S. at 938-46

[50] *Id.* at 955.

[51] *Id.*

consequence."[52] The uncertainty created by the "undue burden" standard in *Casey* only furthers the "jurisprudence of doubt" in abortion law.

Justice Thomas, in his dissent in *Stenberg*, reinforces the lack of constitutional basis for the "undue burden" standard in *Casey* when he contends:

> [T]he joint opinion was constructed out of whole cloth. The standard set forth in the *Casey* plurality has no historical or doctrinal pedigree. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace.[53]

Thus, because *Casey* fails to provide a constitutionally meaningful standard, it functions as a precedent, ironically, to license Courts to subjectively determine whether a particular restriction constitutes a "substantial obstacle." If the dispute in *Casey* itself between Justice Blackmun[54] and the joint opinion authors is insufficient evidence of the potential for varying interpretations, *Stenberg* powerfully illustrates the lack of certainty, consistency, and continuity which *Casey* produced.

The "undue burden" test is also inconsistent with the central holdings of *Roe* as cited by the Justices in *Casey*. The *Casey* test replaces the trimester framework and the "strict scrutiny standard" associated with "fundamental rights," both of which governed in *Roe*.[55] The *Casey* plurality attempts *a posteriori* to relegate these *Roe* tests to a non-binding position in

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[52] *Id.* at 953-54 (emphasis added).

[53] *Id.* at 982.

[54] *Casey*, 505 U.S. at 922-43 (stating that all of the challenged Pennsylvania provisions should have been struck down).

[55] *Id.* at 873, 877.

the 1973 ruling. But an objective reading of both cases supports the conclusion that the undue burden test is just as central to *Casey* as the trimester and strict scrutiny standards were to *Roe* – and the central themes of the two cases cannot be reconciled.

The *Casey* plurality is correct in stating that "Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."[56] The Court has not justified the lines it purports to have drawn with the "reasoned judgment" and "undue burden" standards. It also has not justified its authority and ability to draw such lines in the first place. Consequently, the Court has produced abortion law that is uncertain, inconsistent, and discontinuous.

III.

STARE DECISIS IS NOT A BARRIER TO VACATING *ROE*

A. THIS COURT, AND ITS RECENT PREDECESSORS, HAVE BEEN GENEROUS IN OVERTURNING THEIR OWN PRECEDENTS.

David O'Brien reports the following statistics for the Warren Court: 236 over-turned acts (including 45 Supreme Court decisions); the Berger Court: 293 overturned acts (including 52 Supreme Court decisions); the Rehnquist Court through 1998: 134 overturned acts (including 30 Supreme Court decisions).[57] For the current Court to overturn a prominent case such a *Roe* would not be inconsistent with the Court's history.

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[56] *Id.* at 870.

[57] 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 36 (4th ed. 2000).

B. THE COURT, IN *ROE*, *CASEY*, AND *STENBERG*, MISCONSTRUED THE NATURE OF *STARE DECISIS*.

The principle of *stare decisis*, important to American law and its English Common Law predecessor, contributes significantly to certainty, consistency, and continuity – if properly understood and applied. However, *Stare decisis* is not the ultimate governing principle in American law, especially at the level of constitutional decision-making.[58] An early Court observed "if they [*i.e.*, the courts] were absolutely bound by their prior decisions, they would be without the power to correct their own errors."[59] *Stare decisis* is especially limited in constitutional law. The Constitution is the ultimate precedent; and all court decisions must be measured against our basic organic law. The Courts in *Casey* and *Stenberg* misconstrue stare decisis by making case law superior to the Constitution. *Stare decisis* must be clearly, consistently, and continuously defined and applied. The surest guarantee that this will occur is to recognize the constitutional foundation of *stare decisis*."

Furthermore, the age of a court decision is not necessarily an indicator of its constitutional quality, or its legitimacy. For example, *Plessy v. Ferguson*[60] survived for fifty-eight years before being overturned by *Brown v. Topeka Board of Education*.[61] *Roe*'s life-time of thirty-two years is substantially less than *Plessy*'s.

C. NUMEROUS CHANGES IN LAW SINCE 1973 HAVE ALREADY UNDERMINED *ROE*.

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[58] *Casey*, 505 U.S. at 854.

[59] *Wood v. Brady*, 150 U.S. 18, 23 (1893).

[60], 163 U.S. 537 (1896).

[61] *Brown v. Topeka Board of Education* 347 U.S. 483 (1954).

Casey and *Stenberg*, especially *Casey*'s plurality, express the deepest concern about overturning *Roe*.[62] However, several of *Roe*'s important features have already been changed. These include abandonment of the trimester framework,[63] alteration in the classification of the right to an abortion as a "fundamental right,"[64] and an elevation in the importance of the unborn child's interests.[65]

Despite these changes, the *Casey* plurality avers that a major reason for clinging to *Roe* is because of the "reliance" placed upon it as a precedent.[66] But the "reliance" concept is deficient. Whose reliance is the ultimate standard? How much must a party rely on a precedent for the precedent to outweigh other values and interests? What kind of reliance is worthy of judicial notice – economic, psychological, social, physiological, all of the above, some of the above, or other forms? And how can the Court justify upholding *Roe*'s right to an abortion because of "reliance" when the Court has overruled so many other decisions (and portions of *Roe*) without any mention of "reliance." The "reliance" idea is unclear, inconsistent, and uncertain with other abortion precedents as well as the Constitution.

The limits on *stare decisis* have been aptly described by the high-ranking British Judge, Alfred Lord Denning, who reminded us in 1959, that "If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes

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[62] *Casey*, 505 U.S. at 854-69; *Stenberg*, 530 U.S. at 920-21.

[63] *Casey*, 505 U.S. at 873.

[64] *Id.* at 874-77.

[65] *Id.* at 873.

[66] *Id.* at 855-56.

tumbling around them."[67] In the United States, the "fundamental principles of truth and justice" which protect us are found in the correct interpretation of the Constitution. Court decisions to the contrary are not valid.

CONCLUSION

The principles of justice and the rule of law are foundational to American law and are rooted in the Constitution. Certainty, consistency, and continuity in court decisions are essential to justice and the rule of law. The Constitution is the ultimate embodiment of certainty, consistency, and continuity in American Law. *Stare decisis* is a major Anglo-American principle contributing to certainty, consistency, and continuity in judicial decisions when it is rooted in the Constitution. *Roe's* progeny, *Casey* and *Stenberg*, are not rooted in the Constitution. They contribute substantially to uncertainty, inconsistency, and discontinuity in law. They violate the rule of law and create injustices which are equal to, or greater than, the injustices found to be "manifest" in *Agostini*.

Therefore, this Court should grant petitioner's request for a writ of certiorari, vacate the judgment in *Roe v. Wade*, and grant all that relief requested in the petition.

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RESPECTFULLY SUBMITTED,

WILLIAM F. CUETO
COUNSEL OF RECORD
289 LAUREL WAY
MIAMI SPRINGS, FL. 33166
(786) 514-6200 (PHONE)
COUNSEL FOR AMICI CURIAE

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[67] Lord Edmund-Davies, *Lord Denning: Christian Advocate and Judge*, 2 CHRISTIAN LEGAL SOC'Y Q. 5, 7 (1981).